



April 29, 2003

Ms. Sandra Haberlin
OUSD(AT&L)DPAP(DAR), IMD 3C132,
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 2002-D017

Dear Ms. Haberlin:

The Aerospace Industries Association (AIA) is pleased to provide comments on the proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to “remove the requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials or labor-hour contract unless otherwise prescribed in the contract Schedule.”

First, we would like to thank you and members of the DAR Council for publishing this proposed rule at a time when most of the DAR staff and the Council members are dedicating most of their efforts to the DFARS Transformation Project.

DoD notes in the Background section of the proposal to amend the DFARS that the withholding requirement is “administratively burdensome and may, in some situations, result in the withholding of amounts that exceed reasonable amounts needed to protect the Government's interests.” We are in full agreement with this statement. The additional administrative costs generated by this requirement are incurred by both the Government and the contractor, and the withholds are frequently not justified based on the perceived risks to the government. We estimate that the amount of costs savings that will occur as a result of reduction or elimination of those activities is approximately \$1.8 million annually.

Another major benefit derived from the proposed change is not having to utilize current year appropriations to fund payments of previous withholds. The need to use current year funds occurs in many cases due to funds that were earmarked to pay withheld amounts being canceled before the contractor is authorized to submit a billing for the withholds.

We believe a provision in the proposed rule should be revised to be consistent with the guidance (see attachment) issued by DCMA Headquarters regarding the withholding of fixed fee on cost type contracts. Included in the proposed subpart 232.111, Contract clauses for non-commercial purchases, paragraph (b), is the following statement.

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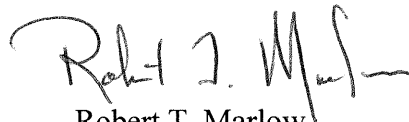
“(iii) If the ACO determines that it is necessary to withhold payment to protect the Government's interests, the ACO shall issue written direction to the contractor to withhold 5 percent of amounts due until a sufficient reserve is set aside.”

We request that the above language “the ACO shall issue written direction to the contractor to withhold 5 percent...” be revised to read “written direction should be issued to the contractor by modification of the contract directing the withholding of 5 percent...” This is consistent with the language used by DCMA Headquarters when it issued Information Memorandum No. 03-121 (attached) on January 14, 2003, providing guidance on “Fee Withholds on Cost-Reimbursement Type Contracts.” Requiring withholds to protect the interests of the Government alters the contract terms and conditions and, therefore, should be documented through a contract modification.

Also, we agree with the decision to implement the change using the DFARS because a DFARS change can be effected in a timely manner. However, we believe that provisions in the FAR that continue to require the 5 percent withholding should also be revised at the earliest possible date to make withholding optional. This will result in consistent processing of withholds across all the Government business segments, of the contractor, resulting in increased administrative cost savings and a better use of all parties resources.

If you have any questions concerning any of our comments, please contact Mr. Dick Powers of my staff. Dick may be reached on 703 358-1042. His email address is powers@aia-aerospace.org.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert T. Marlow", with a stylized flourish at the end.

Robert T. Marlow
Vice President
Government Division

Attachment

Information Memorandum No. 03-121

Memorandum For DCMA Districts and CMOs

Subject: Fee Withholds on Cost-Reimbursement Type Contracts
(INFORMATION)

Date: January 14, 2002

Target Audience: Administrative Contracting Officers and Contract
Administrators

New Information/Guidance/Tools:

- FAR Clauses 52.216-8, Fixed Fee, 52.216-9, Fixed Fee -- Construction, and 52.216-10, Incentive Fee, permit the Administrative Contracting Officer (ACO) to withhold fee if it is necessary to protect the Government's interest after payment of 85% of the fee.
- Normally, there should be no need to exercise the option of withholding fee for a contractor with a record of timely submission of final cost vouchers and certified final indirect cost proposals, and that complies with other contract terms and conditions.
- If the ACO determines that it is necessary to withhold fee to protect the Government's interests, written direction should be issued to the contractor by modification of the contract. The following paragraph provides suggested wording for the modification:
 - This modification is issued to incorporate fee withholding in accordance with FAR Clause 52.216-8 (or -9 or -10, as appropriate). In order to protect the Government's interest, [contractor] is hereby directed to begin withholding fee from billings under this contract until a reserve is set aside in the amount of \$_____ (amount of reserve shall not exceed 15% of the total fixed fee or \$100,000, whichever is less). Fee shall be released in accordance with FAR Clause 52.216-8 (or -9 or -10, as appropriate).
- In some instances contractor's are automatically withholding fee from billings, although not directed by anyone in the Government.
- ACOs should be aware that DCMA Headquarters has received queries from Industry regarding this long-standing practice and as a result of our discussions, many contractor's will stop automatically withholding fee from billings, unless directed by the ACO. Contractors may issue a letter to the ACO and Defense Contract Audit Agency alerting them of this change in fee withholding practice.
- This information should aid in the administration of fee withholds under cost-reimbursement type contracts and is applicable to One Book Chapter 9.5, Public Vouchers.

Point of Contact for Further Information:

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Signature:

DAVID E. RICCI, Director, Contract Business Operations